No. 06-622

In The Supreme Court of the United States

OREGON TROLLERS ASSOCIATION; SUISLAW FISHERMEN'S ASSOCIATION; THOMAS HARRIS; JAMES MOORE; JIM GAGNON; JOHN FRASER; GARTH PORTEUR; STAN JONES; RUSSELL OTT; DONALD JACOBS; GREAT AMERICAN SMOKEHOUSE AND SEAFOOD COMPANY; CAP'N ZACH'S CRAB HOUSE; ZACH ROTWEIN; PAT HOUCK; and DAN MORRIS,

Petitioners,

v.

CARLOS M. GUTIERREZ, Secretary of the United States Department of Commerce; NATIONAL MARINE FISHERIES SERVICE (NMFS); WILLIAM T. HOGARTH, NMFS Director; D. ROBERT LOHN, NMFS Regional Director for the Northwest Region; YUROK TRIBE; and HOOPA VALLEY TRIBE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT YUROK TRIBE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to this proceeding are as listed in the caption to this Brief in Opposition to Petition for Certiorari. The parties include the respondents, Yurok Tribe and Hoopa Valley Tribe, which were omitted from the petition. Rule 12.6.

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The Respondent, Yurok Tribe, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 452 F.3d 1104 (9th Cir. 2006).

STATEMENT OF THE CASE

Petitioners challenged a regulation adopted by the National Marine Fisheries Service (NMFS) restricting ocean salmon harvests on the Pacific Northwest Coast for the 2005 fishing season. Petition at 8. The regulation was adopted in response to the agency's projection "that a critically low number of Klamath [River] chinook [salmon] would escape that season's harvest to survive and to spawn in the wild." Appendix (App.) A-2.[1] Ocean harvest restrictions for 2005 were crafted to address the fact that "Klamath River salmon have suffered dramatically in recent years." App. A-6.[2]

In seeking this Court's review of the NMFS ocean harvest regulation, the Petitioners have not accurately described the scope of the regulation, and have mischaracterized the record with respect to the regulation's effect on the fishery and fishing communities.

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[1] Citations are to the appendixes contained in the Petition.

[2] The Yurok Indian Reservation straddles the Klamath River from its mouth at the Pacific Ocean, upstream approximately 45 miles to the confluence of the Trinity River. App. A-9. The Yurok Tribe has resided on those lands and fished the Klamath River since time immemorial. The importance of fish, particularly salmon, to the Yurok Tribe cannot be overstated. The Tribe intervened in support of the NMFS ocean harvest restrictions intended to protect and restore the long-term health of the fishery. *See, Parravano v. Babbitt,* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

NMFS did not "shut down" the Chinook salmon ocean fishing season in 2005. Petition at 23. Nor did NMFS restrict the ocean fishing season "to an unprecedented level, decimating the fishing industry, the Fishermen's livelihoods, and West Coast fishing communities." *Id.* at 26. The facts are far less dramatic than represented to this Court.

Following the 2004 fishing season, NMFS found that Klamath River salmon populations were still in decline. App. A-6. To protect the "long-term interests" of commercial fishers, Indian tribes which harvest those fish in the Klamath River, communities which rely on the fishing industry, and the stocks of fish themselves, NMFS imposed restrictions on ocean harvests in 2005. App. A-7, A-8. In specific locations at specified times, the ocean fishery was nonetheless open. App. B-11. NMFS predicted, and the Petitioners did not dispute, that salmon fishers' income under these restrictions would be $33.7 million, a 28% decline from 2004. App. A-8. The overall fishing community income in 2005 was predicted to be $394 million under the restrictions, down 16% from the previous year. App. A-29. These were not "unprecedented" restrictions. App. B-19 (District Court notes that 1992 ocean zone closures were greater than in 2005). Petitioners incorrectly describe these restrictions on the ocean fishery as a "shut down." Petition at 23. They are incorrect in describing a 16-28% decline in income as a "decima[tion]" of the industry. Petition at 26. The restrictions on ocean fishing were characterized by the Court of Appeals as being between "somewhat" and "substantially" more restrictive than the preceding year. App. A-7.

Petitioners further misstate the record by characterizing the NMFS ocean fishing regulation as one which

"ignor[es] the multitude" or "overwhelming numbers" of hatchery fish in the salmon population. Petition at 24; Petition at Question Presented 2. As the lower court correctly observed, NMFS looked at the entire Chinook salmon population to determine which were hatchery-spawners, and which would spawn in the wild; the agency then calculated the allowable harvest levels on the basis of that entire population. App. A-6 to A-7; B-7 (2004 population consisted of 79,000 adults of which 24,300 spawned in natural areas). The 2005 ocean fishing regulations clearly accounted for the presence of hatchery-spawning salmon.

The Petitioners also fail to note that the development of the regulation they now challenge was an open and public process. The Pacific Fishery Management Council held public hearings, heard testimony from commercial fishermen, weighed various options for management measures, issued pre-season reports on its deliberations, and considered and rejected the relief sought here (a reduction in the minimum number of fish which must be permitted to escape the ocean harvest). App. A-6 to A-7; App. B-8 to B-12. The regulation crafted following these public hearings was implemented without additional public comment. App. A-8. The public, including the commercial fishermen, fully participated in the agency's development of the regulation.

REASONS FOR DENYING THE PETITION

I. Neither the Decision Below Nor the Record Raise the First Question Presented in the Petition

The first question posed by Petitioners is whether a federal agency can "create time constraints that establish

a rulemaking procedure that will never comply with the prior public notice and comment requirements of the Administrative Procedure Act. . . ." The Court of Appeals did not decide that question in this case. Moreover, the record in this case does not contain facts that raise that question or permit the formulation of that question. As a result, this case is not appropriate for this Court's review.

NFMS did not "create" time constraints that enabled it to invoke the impracticability exception to the notice and comment requirements of 5 U.S.C. § 553(b)(3)(B). Rather, as the Court of Appeals explained, the specific facts of the case demonstrate that the fishery stock data on which the management measures were based was not available to NMFS until shortly before the start of the fishing season because of the unique spawning cycles of Pacific Coast salmon. App. A-34. In addition, NMFS could not take final action on the measures until the Pacific Fisheries Management Council (PFMC) completed its recommendations, which did not occur until a month before the fishing season was set to begin. As a result, the time constraints under which NMFS must operate are not of its own making, but are driven primarily by natural forces and which both it and the PFMC must accommodate.

Petitioners' assertion that NMFS adopted a rulemaking procedure here that will "never" comply with the APA notice and comment procedures is simply wrong. Following settled law, the Court of Appeals applied the good cause standard in the context of the unique facts of this case. NMFS must adopt fishery management measures on an annual basis, and cannot, of course, adopt a permanent good cause exception that applies regardless of circumstances. The Panel noted that NMFS' justification for

dispensing with the public comment procedures might be invalid in future years if the agency did not provide "season-specific reasons why the good cause exception is needed." App. A-35.

The Petitioners mischaracterize the holdings below. The Ninth Circuit has not established a new rule of law that requires or authorizes agencies to forgo notice and comment in every case where they are faced with time pressures. On the contrary, the Ninth Circuit previously has struck down NMFS' efforts to invoke time pressures in other cases as the justification for not opening a public comment period. *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429, 441-42 (9th Cir. 1993) (generic timeliness considerations of rulemaking on an annual basis cannot constitute good cause); *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003) (generic complexity of data collection and time constraints are not adequate to justify NMFS' decision not to open a public comment period on measures to regulate taking of groundfish). The Panel in this case was careful to distinguish those cases on their facts. App. A-33, 34. This case, therefore, does not present the question of the lawfulness of a rule that would forever foreclose public comment when time pressures are at play. Because this case does not raise the first Question Presented, review should be denied.

II. There is No Inter-Circuit Conflict On the Proper Standard for Determining Whether the Specific Factual Context Warrants Invocation of the Impracticability Exception to the APA's Notice and Comment Requirements

Petitioners assert this Court's review is needed to ensure uniformity among the circuits concerning the proper standard for invoking the good cause exception to APA notice and comment requirements.[3] Petitioners' perceive a conflict where none exists. Petitioners point to no case in which a court of appeals reached a different result on the same or similar facts. The Ninth Circuit here applied a good cause standard that is uniformly followed by other circuits. There is no reason to believe that should a similar case arise, the result would be any different.

The Court of Appeals ruled that NMFS provided legally sufficient reasons to dispense with the notice and comment procedures under the APA. The court followed an established, narrow, case-by-case pathway that turns on the "specific circumstances pertinent to the year at issue." App. A-33. The Ninth Circuit's standard also requires that the agency "adequately explain[]" the grounds for the good cause exception. App. A-33. This context-specific approach to determining the impracticability prong of the good

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[3] Petitioners' argument that review is warranted because NMFS' rulemaking process conflicts with congressional intent is also unavailing. Even if true, which Respondent Yurok Tribe does not concede, the Court of Appeals' decision upholding NMFS' fishery management measures does not so far depart from "the accepted and usual course of judicial proceedings" so as to call for the exercise of this Court's supervisory power. Rule 10(a). The Court of Appeals has not improperly applied rules of statutory interpretation governing the use of congressional intent.

cause test is in harmony with the approaches of other courts of appeal. *See, e.g., Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (adequacy of justification for dispensing with public comment under good cause exception is to be determined under specific circumstances of the case); *American Iron & Steel Institute v. Environmental Protection Agency*, 568 F.2d 284 (3d Cir. 1977) (adequacy of time constraint justification depends on specific facts); *Jifry v. Federal Aviation Administration*, 370 F.3d 1174 (D.C. Cir. 2004) (foregoing public comment justified by specific facts that delay in implementation of new regulation could cause security threat); *Natural Resources Defense Council v. Abraham,* 355 F.3d 179 (2d Cir. 2004) (facts did not justify waiver of notice and comment procedures because emergency was of agency's own making).

Petitioners attempt to manufacture a conflict by misconstruing the applicable law. Petitioners suggest an inconsistency between the law in the Ninth Circuit and the law in other circuits on the question of whether an emergency is required to justify waiver of the public comment requirement. Petition at 18. No court has held, however, that an emergency is the exclusive means by which the good cause exception can be satisfied. Rather, an emergency is a sufficient but not a necessary condition for satisfying the exception. The Ninth Circuit, like other circuits that have considered the question, has held that "[e]mergencies, though not the only situations constituting good cause, are the most common." *Natural Resources Defense Council v. Evans*, 316 F.3d at 911; *see also Jifry v. Federal Aviation Administration*, 370 F.3d at 455 ("The exception excuses notice and comment in emergency situations or where delay could result in serious harm.") (citations omitted). Thus, the Ninth Circuit was correct in

not faulting NMFS for failing to apply an emergency requirement for waiving public comment. The fact that other courts have based a finding of good cause on emergencies does not create a conflict with the Ninth Circuit because there are other factual grounds on which good cause can be based. In essence, Petitioners complain about the application of a properly stated rule, which is not a ground for certiorari review. Rule 10.

Petitioners fare no better in attempting to set up a circuit conflict in the application of the rule that good cause exists when public rulemaking would prevent the agency from carrying out its core functions. Petition at 21-23. Petitioners wrongly say the Ninth Circuit does not follow this rule ignoring that court's express holding to the contrary. *Natural Resources Defense Council v. Evans*, 316 F.3d at 911 ("Under the APA, notice and comment is not 'impracticable' unless the agency cannot both follow section 553 and execute its statutory duties.") (internal quotations and citation omitted). The Ninth Circuit in *NRDC* relies for this proposition on the same First Circuit case Petitioners cite as evidence of a circuit conflict. *Id.* (citing *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983)). Again, the fatal defect with Petitioners' argument is that they complain about the application of a properly stated rule. There is no circuit conflict requiring this Court's intervention.[4]

[4] It is worth noting that none of the various circuit court opinions on which Petitioners rely for the supposed conflict acknowledge that the rule they state and follow varies in any way from the rule applied by other circuits. In fact, the decisions not infrequently rely on cases from other circuits as authority for the applicable rule. *See, e.g., Riverbend Farms v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) (citing *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983) for proposition that departure

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III. The Court of Appeals Correctly Concluded That NMFS' Restrictions on the 2005 Pacific Ocean Fishing Season Were Lawful and Supported by Sound Science

Petitioners argue that in regulating the ocean fishery NMFS "ignor[es] the multitude" of hatchery salmon; simultaneously, the Petitioners argue that NMFS improperly treats hatchery-spawners and natural-spawners as "two separate stocks of fish." Petition at 24, 27. (The Petitioners do not reconcile the inconsistency.) In Petitioners' view, by both ignoring and treating separately hatchery fish, NMFS violates the Act's requirement that the agency manage the fishery "under sound conservation and management principles." *Id.* at 27 (treatment of the two groups as "separate stocks" allegedly violates the Act). The Court of Appeals quite correctly rejected these claims.

The Court of Appeals noted that the Petitioners presented no scientific evidence at all, and certainly none which would contradict the agency's conclusion that a distinction between hatchery spawners and natural spawners was based upon sound science. App. A-21, A-22 (Petitioners "did not introduce any evidence to dispute the scientific basis" for the natural spawner escapement goal); A-25 (noting scientific analyses supporting use of natural spawners as indicia of viability of entire natural and hatchery population); *and see*, B-21 (district court notes "importance of naturally spawning runs to the long-term benefit of the species").

Without scientific support for their claims, Petitioners turn here, as they did below, to the definitions of the words

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from APA procedures is justified when compliance would jeopardize the agency's assigned mission).

used in the Act to shore up their claim that distinguishing hatchery from wild fish was unlawful in managing the fishery. Petition at 24-27. They argue that both hatchery and natural spawners are the same "species" and the same "stock." *Id.* In Petitioners' view, it then followed that NMFS "had no choice but to manage the entire Klamath Chinook stock, . . . , as a unit throughout its management process." *Id.* at 25. The Court of Appeals examined the words used in the Act in light of the unchallenged scientific acceptance of the distinctions between hatchery and wild fish. The court concluded that the agency acted reasonably.

Based upon the Act's definition of "fishery," the Court of Appeals concluded that NMFS could rationally manage hatchery spawners and natural spawners as two stocks of fish capable of being "treated as unit." App. A-20 to -21, *citing* 16 U.S.C. § 1802(13), and A-24. In light of the Petitioners' failure to present a scientific basis for their claim that hatchery and wild fish are identical, and in light of the Act's grant of flexibility to the agency in managing "as a unit" identifiable fish stocks (16 U.S.C. § 1802(13)), the Court of Appeals did not err in upholding the agency's decision to account for both hatchery- and natural-spawners.

Yet Petitioners persist in arguing a strained interpretation of the Act's terms ("species," "stock," and "unit"). Petition at 24-25. Not surprisingly, Petitioners fail to present any scientific evidence for their assertion that the fact that salmon spawns with or without "human intervention" (App. B-21) is "irrelevant." *Id.* at 25. The scientific evidence is contrary to the Petitioners' claims. App. A-25. There is simply no merit to their claims.

Finally, the Yurok Tribe points out that the Petitioners have a sensible alternative forum in which to pursue their claim that hatchery and wild fish are identical. They may petition NMFS for rulemaking, seeking a revision to the conservation objective of 35,000 natural spawners escaping the ocean each year. *See*, www.pcouncil.org/decisions/currentdec.html#salmon (The Pacific Fishery Management Council agreed in November, 2005, to consider amendments to the conservation objective) (last visited November 30, 2006). If such relief were denied, Petitioners would have the right to seek review. *See, Clark v. Busey*, 959 F.2d 808, 813 (9th Cir. 1992).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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